Reflecting Methods

Method in Comparative Law – The Contextual Approach

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While reading some current works on comparative law in general, and on its methodology in particular, one may get the impression that it is extremely difficult, if not impossible, to do comparative law, to work with foreign law and, above all, to understand it. Yet, this impression is difficult to reconcile with the everyday experience of many comparatists: most experts, while recognizing the typical problems of comparative law, still arrive at acceptable results. They will, of course, admit to making mistakes from time to time; but they will also feel that they more or less understand the respective foreign law, and know what they are doing. Indeed, the theoretical efforts of modern comparative methodology, despite their indisputable intellectual merits, would greatly profit from a more practical orientation, from a more intensive application of common sense, and from getting less lost in ideological battles. The contextual approach aims to put this ideal into practice, to provide a practical and pragmatic approach to comparative law method, and to defend this approach on a methodological basis.[1]

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1 The contextual approach is further developed and applied to the different legal systems of the world in Uwe Kischel, *Rechtsvergleichung* (2015), passim, in particular § 3, marginal note 1 ff.; English translation of this book (with identical numbering of paragraphs and marginal notes): Uwe Kischel, *Comparative Law* (Oxford University Press (2019).

A. The Current Methodological Discussion

Discussions about methodology in comparative law are in vogue.[2] This observation, however, is neither surprising nor new. The relevant discussions have been going on for at least thirty years.[3] Already in 1985, Frankenberg proposed what has become characteristic for a large part of methodological literature: a fundamental criticism of the traditional method, i.e. of the functionalist method formulated by Zweigert and Kötz in their seminal book '*Einführung in die Rechtsvergleichung*'.[4] The discussion is as far from being over today as it was in the 1980s. Only one thing is clear: the time when a comparatist could simply juxtapose the words of different codifications and call this effort 'comparative law' is definitely over; it is even difficult to imagine that such a simplistic approach ever existed.[5]

In the literature that focuses on methodology, there is a certain predominance not only of the English language, but also of methodological ideas that can hardly deny their origin in typically American legal thought, that is, in legal realism in a wider sense.[6] There are many calls for a more

2 See e.g. recently Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (2014); Mathias Siems, *Comparative Law* (2014), 13 ff, 95 ff; the contributions in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law - Essays in Honour of Mark Van Hoecke* (2014); for comparative constitutional law Ran Hirschl, *Comparative Matters* (2014), 224 ff.

3 See e.g. Nora V. Demleitner, 'Combating Legal Ethnocentrism – Comparative Law Sets Boundaries', Arizona State Law Journal 31 (1999), 737; Günter Frankenberg, 'Critical Comparisons – Re-thinking comparative law', Harvard International Law Journal 26 (1985), 411; Hiram E. Chodosh, 'Comparing comparisons - In search of methodology', Iowa Law Review 84 (1999), 1025; Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century', American Journal of Comparative Law 50 (2002), 671; Léontin-Jean Constantinesco, *Rechtsvergleichung, vol. III*: *Die rechtsvergleichende Wissenschaft* (1983), 51 ff; Ralf Michaels, 'The functional method of comparative law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006), 339; Rodolfo Sacco, 'Legal formants – A dynamic approach to comparative law', American Journal of Comparative Law 39 (1991), installment I, 1-34, installment II, 343-401.

4 Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, 1996), 33 ff.

5 For a description of the outdated approach that regarded comparative law as purely descriptive, and which excluded any question concerning the reasons for differences and the actual effects in society see Ulrich Drobnig, 'Rechtsvergleichung und Rechtssoziologie', RabelsZ 18 (1953), 295, 295 ff.

6 The relationship between the criticism and legal realism is clearly expressed e.g. by David J. Gerber, 'System dynamics – Toward a Language of Comparative Law?', American Journal of Comparative Law 46 (1998), 719, 733; on the characteristics of legal

rigorous theorization, as well as calls for interdisciplinary approaches, for methods that are almost exclusively inspired by the social sciences, denying any autonomy to legal thought. The comparatist who is looking for ideas or solutions for his practical work will often remain bewildered by these approaches. Sometimes, it is the very style of certain contributions that reinforces such reactions. Especially, but not exclusively, postmodern authors show a pronounced tendency to use difficult or even incomprehensible language. Phrases like 'The comparatist must adopt a view of law as a polysemic signifier which connotes inter alia cultural, policitical [sic], sociological [...] referents'[7] or 'There always remains an irreducible element of autochthony constraining the epistemological receptivity to the incorporation of a rule from another jurisdiction'[8] make sense if one is ready to accept the postmodern idea that complexity is the only way to systematically represent a phenomenon that one perceives as complex.[9] Thus, practitioners of (comparative) law are not the only ones to be reluctant to accept such an approach. As a well-known English comparatist remarked: 'some scholars seem to delight in the creation of a "language" that is opaque to all but the initiated.'[10]

Two other particularities of the methodological discussion strike the practical comparatists. Firstly, it is notable that criticism of the traditional method, however strong it may be, is very often not accompanied by an alternative, that is to say, by a concrete and positive proposal for doing better. Of course, alternative methods exist,[11] but in most cases they are not proposed by the advocates of critique. Secondly, the more fundamental the

realism see e.g. Joseph W. Singer, 'Legal realism now', California Law Review 76 (1988), 465; Kischel (n. 1), § 5 marginal note 254 ff.

7 Pierre Legrand, 'The impossibility of "legal transplants"', Maastricht Journal of European and Comparative Law 4 (1997), 111, 116.

8 *Ibid*, 118.

9 For this approach André-Jean Arnaud, 'Some challenges to law through post-modern thought', Rechtstheorie Beiheft 19, 157, 160.

10 Basil Markesinis, *Comparative law in the courtroom and classroom* (2003), 52; for an even more negative description of such tendencies in the social sciences see Karl Popper, 'Against big words' in: Karl Popper, *Lectures and Essays from Thirty Years* (rev. edn 1995), 82, 86, 94: 'Unfortunately, many sociologists, philosophers, et al. traditionally regard the dreadful game of making the simple appear complex and the trivial seem difficult as their legitimate task. That is what they have learnt to do and they teach others to do the same. There is absolutely nothing that can be done about it.' ibid., 94.

11 For a detailed description see Kischel (n. 1), § 3 marginal note 31 ff.

critique of functionalism becomes, the less concrete comparative studies try to do better. It may even be that the same experts who decry functionalism do not really proceed in a fundamentally different way when they are simply *doing* comparative law.[12]

B. Critique of the Traditional Approach

Looking more closely at the critique of the traditional approach, which lies at the heart of much of the methodological literature in comparative law, one can distinguish two different levels: a detailed critique of functionalism (1), and a more general critique of the underlying attitude of the traditional approach (2).

1. The Detailed Critique of Functionalism

Critics of functionalism attack, first of all, the individual aspects of this method. Thus, the very notion of 'function', i.e. the idea that law serves to rationally solve certain social problems, appears dubious to them. They insist on the idea that such a function cannot be determined in a meaningful way. Clearly, a norm can have many different functions. The important thing is to know for whom and against whom it performs this function, in respect of what values, who determines these values, how and with what effects.[13] And indeed, it makes a great difference whether, for example, freedom of opinion is considered to aim at the protection of a general right of personality as well as human dignity, as is the tendency in Germany; or whether it serves primarily to maintain a free marketplace of ideas, as is the tendency in the United States;[14] or if one associates freedom of opinion

12 See e.g. Pierre Legrand, 'Alterity – About rules, for example' in: Peter Birks and Arianna Pretto (eds), *Themes in comparative law* (2002), 21 ff.; another such example is found in Werner Menski, *Hindu law - Beyond tradition and modernity* (2003), passim, who describes himself as 'postmodern', ibid., 545.

13 See Myres S. McDougal, 'The comparative study of law for policy purposes – Value clarification as an instrument of democratic world order' in: William E. Butler (ed.), *International Law in Comparative Perspective* (1980), 191, 219 n. 24.

14 See e.g. Donald P. Kommers, 'Kann das deutsche Verfassungsrechtsdenken Vorbild für die Vereinigten Staaten sein?', Der Staat 37 (1998), 335, 338 ff.; Winfried Brugger, 'Der moderne Verfassungsstaat aus Sicht der amerikanischen Verfassung und des Grundgesetzes', Archiv des öffentlichen Rechts 126 (2001), 337, 359 ff.; on the influ-

with fascist and superstitious propaganda;[15] or if one looks at it not from an individualistic point of view but as an instrument for shaping the way society thinks, as a means to promote a socialist order.[16] Moreover, critics insist on the idea that law often does not solve a rationally defined problem. For example, a statute may be ineffective or symbolic, lose its former function, or involuntarily acquire new functions.[17] Finally, it seems problematic to claim, as some functionalists do, that one cannot compare norms that serve different functions, because this would exclude any function that is not universal, but depends on the social structure or the general conception of the state.[18]

Other points of criticisms may be mentioned, here, without going into further detail: Functionalism, according to its opponents, does not provide information on the process of understanding, on the research strategies to be used.[19] Unlike other sciences, such as theology or sociology, comparative law has not developed theories of comparison; thus, basic questions are not addressed, e.g. what a comparison is, or what the conditions of comparability are.[20] Comparative practice is criticized for focusing too much on the description of different legal orders, and not on the actual comparison.[21]

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ence of human dignity in European and American constitutional law, see in particular the work of James Q. Whitman, e.g. James Q. Whitman, 'The two Western cultures of privacy – Dignity vs. liberty', Yale Law Journal 113 (2004), 1151, passim.

15 On this tendency in Russia see Angelika Nußberger, 'Die Frage nach dem *tertium comparationis* – Zu den Schwierigkeiten einer rechtsvergleichenden Analyse des russischen Rechts', Recht in Ost und West 42 (1998), 81, 83.

16 On socialist theory see e.g. Karl-Peter Sommermann, 'Funktionen und Methoden der Grundrechtsvergleichung' in: Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte*, vol. I (2004), § 16 marginal note 59; on fundamental freedoms in socialism in general see Georg Brunner, 'Grundrechtstheorie im Marxismus-Leninismus' in: Merten and Papier (n. 16), § 13 marginal note 49 ff.

17 See Oliver Brand, 'Conceptual comparisons – Towards a coherent methodology of comparative legal studies', Brooklyn Journal of International Law 32 (2007), 405, 415 ff.

18 See Jaakko Husa, 'Farewell to functionalism or methodological tolerance?', RabelsZ 67 (2003), 419, 431; Brand (n. 17), 417; on the interdependence of national problems and data needs see Constantinesco (n. 3), 54 ff.

19 Husa (n. 18), 433.

20 See Reimann (n. 3), 689 f. and on comparison in other disciplines Nils Jansen, 'Comparative law and comparative knowledge' in: Reimann and Zimmermann (n. 3), 305, 318 ff.

21 See Chodosh (n. 3), 1056 f.; Axel Tschentscher, 'Dialektische Rechtsvergleichung – Zur Methode der Komparistik im öffentlichen Recht', Juristenzeitung (2007), 807, 810, 812.

The cultural context, it is said, does not play an adequate role.[22] Neutrality, to which the functionalist should aspire, is not always necessary, and might not be achievable, at all.[23]

The critique focuses not only on individual aspects of functionalism, but also on its background. For example, functionalism is accused of emphasizing unity rather than diversity. It is supposedly interested only in similarities, not differences, a defect which is brought to a head in the famous *praesumptio similitudinis*.[24] Functionalism is also criticized for focusing only on norms and law. Thus, functionalism appears positivistic, and not realistic.[25] Moreover, functionalism is considered to be unsuited for certain types of research such as legal transfers, the comparison of legal cultures, or comparative research on the intellectual development of a problem and its solution.[26] To some, it lacks the 'big issues' to which all comparatists could contribute their partial results. Such big issues could, for instance, be the basic structures, the nature and the development of law, the relationship between law and economy, or between law and society, or predictions about the future actions of legal actors.[27] Finally, some decry the isolation of traditional comparative law from other social sciences, especially in terms of methodology,[28] as well as the isolation between the various specialized fields of comparative law.[29]

22 Gerber (n. 6), 722; Husa (n. 18), 428.

23 See Tschentscher (n. 21), 1811 f.; Chodosh (n. 3), 1050 f.

24 See Vivian Grosswald Curran, 'Cultural immersion, difference and categories in U.S. comparative law', American Journal of Comparative Law 46 (1998), 43, 67 ff.; Vivian Grosswald Curran, 'Dealing in Difference: Comparative Law's potential for broadening legal perspectives', American Journal of Comparative Law 46, (1998), 657, 666; Pierre Legrand, 'The return of the repressed – Moving comparative legal studies beyond pleasure', Tulane Law Review 75 (2001), 1033, 1033 f.; Frankenberg (n. 3), 436 f.

25 Frankenberg (n. 3), 421, 433, 445; Gerber (n. 6), 722, 725 f., 733.

26 See Michaels (n. 3), 341; Brand (n. 17), 417, 420.

27 See Reimann (n. 3), 697 ff.

28 In this sense see Samuel (n. 2), passim, e.g. 5, 23 et f., 79; Jansen (n. 20), 318 ff.; Michaels (n. 3), 344 ff.

29 See Reimann (n. 3), 687 f.; Gerber (n. 6), 722 ff.; Annelise Riles, 'Wigmore's treasure box – Comparative Law in the Era of Information', Harvard International Law Journal 40 (1999), 221, 230 ff.

2. The Lack of 'Theory'

a) Social Sciences to Save Comparative Law

The root of this criticism can often be found in an attitude that deplores a lack of method, of theory, of reflection on methodology in traditional comparative law. It supposes to overcome the common sense approach, and to replace it by a more theorized one:[30] comparative law must learn from social sciences, recognize their techniques, their methods, their models, in short, the theory developed there. At first sight, this attitude will be rather astonishing to the traditional comparatist. After all, he *does* have a method: In order to compare a question of law in two legal orders, he searches as thoroughly as possible for the solutions given and for their real effects in each legal order, notes the similarities and differences, and then finds the legal, political, social reasons for them. This is a set of systematic steps taken with a specific aim in order to arrive at conclusions that are at least subjectively new. By definition, it is therefore a method. So, where is the problem? The criticism expresses its regrets that it is not clear how the great masters of comparative law, such as Ernst Rabel, arrived at their results,[31] and that the traditional comparative approach seems to proceed more on a case-by-case basis than in any systematic fashion. At first glance, one might therefore assume that the critique is looking for some kind of cooking recipe that would allow the jurist to simply execute one of the prescribed steps after another in order to achieve an interesting, enlightening, creative and up-to-date comparative law results. Such a conception of scholarship would, however, be strongly out of touch with reality. There simply is no such method in the sense of a simple recipe that would allow researchers – be it in natural sciences, in social sciences, or in law – to develop innovations and in-depth knowledge. On the contrary, their starting point is often a brilliant idea, a hypothesis, an inspiration. In a way, however, opponents of the traditional method seem to have realized this. For the few rather traditional authors who have tried – with many reservations – to provide a kind of instruction manual, a recipe for comparative law[32] are, in general,

30 See e.g. recently Samuel (n. 2), 19 f.

31 Markesinis (n. 10), 22.

32 See e.g. Léontin-Jean Constantinesco, *Rechtsvergleichung, vol. II: Die rechtsvergleichende Methode* (1972), 137ff.; Peter De Cruz, *Comparative Law in a Changing World* (3rd edn, 2007), 242 ff.

simply ignored by the critics. What, then, is this method or this theory that critics miss so much?

The current critique of traditional comparative law is very similar to that addressed at historical scholarship around the 1970s. Thus, the debates about historical method and theory can easily serve as a guide to understanding the situation in comparative law. In history, some saw a need for more theory, that is, a need for reflection on the methodological conditions of scientific work, in order to overcome the common sense approach and the naive reliance on this common sense in the analysis of facts. Here, it was said, history could learn from systematic social sciences. Research techniques, methods for developing hypotheses and models, and specific theories worked out in those fields needed to be taken into account.[33] This brief description will immediately sound familiar to any comparatist who has followed the methodological discussions of the last few decades. Indeed, the background is the same: only the analytical models of social sciences, borrowed from natural sciences, are claimed to be scientific, to have scholarly value. Consequently, comparative law (like history), which does not work analytically, but phenomenologically and hermeneutically, seems almost automatically to be without method, without theory, and therefore without value[34] – and in dire need to be rescued by social sciences.

b) Some Theory of Science: Analytical and Historical Questions

In the end, the call for analytical methods to the exclusion of all others is strongly ideological. The typical analytical question starts with contemporary problems and searches for a way to solve them. Existing work on the question is reviewed, connected with the problem, and evaluated according to whether it is correct or incorrect, whether it contributes to a solution or not. In other words, ideas are analyzed in the light of contemporary perspectives, not in their – for instance historical – context.[35] When we read e.g. Thomas More's *Utopia*, an analytical question would be whether women should really obey men, or whether adultery should be punished by death – the answer being clear. On the other hand, a historical question –

33 See the summary of Reinhard Rürup, 'Zur Einführung' in: Reinhard Rürup (ed.), *Historische Sozialwissenschaft* (1977), 5, 8 f.

34 See e.g. recently Samuel (n. 2), 19 ff.

35 On this difference and on the following explanations see Helmut Seiffert, *Einführung in die Wissenschaftstheorie*, vol. II (11th edn, 2006), 57 ff, 234 ff.

which is often found in the humanities - does not consider past statements only as simple contributions to the solution of a specific problem, which are either accepted or rejected, but starts to discuss these statements as such, i.e. initially without evaluation. In the example of *Utopia*, the question is thus not whether More's position is correct or incorrect, acceptable or not, but this position is examined within the context of its time, in light of its significance for the social context in which it emerged – in a word: historically. The concrete historical question could be, for example, in what way More's thinking was new or revolutionary at its time. Other examples can easily be found in music or history of art, where analytical questions (e.g. who makes the best music, the Rolling Stones, Miles Davis or Mozart?) prove to be nonsensical at first sight.

Ideology comes into play, especially in the debates after 1968, when one realizes that a historical question is never 'critical' in the sense that it does not, for example, approach the Middle Ages using modern concepts (emancipation, human rights), does not evaluate the past from a modern point of view, and does not directly try to draw conclusions for present-day problems. The historical approach tries to understand that which is different precisely as different, and to understand it on its own terms. It is not primarily interested in the historical dimension of current problems, it does not orient its research towards certain predetermined interests. The criticism born out of the analytical approach is obvious, and was well formulated in historical science: 'Too often, historicism as a mere doctrine of comprehension has led history not only to limit itself to empathetic approval but also to willingly capitulate to the normative power of the factual by approving of the status quo in the societies and political systems under study. In other words, it has too long contented itself with interpreting intentional conduct using standards immanent to the period under study, while overlooking or denying the fact that the past can and should also be analyzed using today's theoretical points of view.'[36]

36 Hans-Ulrich Wehler, 'Einführung' in: Hans-Ulrich Wehler (ed.), *Geschichte und Soziologie* (2nd edn, 1984), 11, 20 ('Zu oft hat auch die bloße Verstehenslehre des Historismus dazu geführt, daß sich die Geschichte sowohl auf zustimmendes Nachempfinden beschränkt, als auch mit einem bereitwilligen Kniefall vor der normativen Kraft des Faktischen den jeweiligen Status quo in Gesellschaft und Politik gebilligt hat. Anders gesagt: sie hat sich zu lange mit der Interpretation intentionalen Handelns mit Hilfe zeitimmanenter Maßstäbe ... zufrieden gegeben, aber übersehen bzw. geleugnet, daß Vergangenheit auch jeweils unter den theoretischen Gesichtspunkten von heute aufgeschlüsselt werden muß und kann.').

The distinction between analytical and historical questions is typically reflected in different methods. For analytical questions, on the one hand, methods such as induction and deduction, model-building, statistics, or considerations of monetized efficiency (economic analysis of law) are well-suited. For historical questions, on the other hand, hermeneutics is particularly suitable.[37] Historical questions require a phenomenological approach in which we try to grasp and describe a concrete phenomenon as best we can, in an integral and holistic manner, and as free from preconceived categories as possible. In this sense, a hermeneutical science like history is, in fact, 'theory-free': it lacks overreaching ideas or constructs which could serve to explain all of history, to understand it (exclusively) from a specific modern angle, or to squeeze it into a unified, abstract conceptual framework. After all, hermeneutic science, because it is not analytical, does not even try to look at the totality of history as the expression of e.g. class struggle, a clash of cultures, predominantly masculine thought, or economic progress. The label 'theory-free' can be applied with particular emphasis if theory is defined according to rigorous criteria, which demand that any theory must be 'powerfully explanatory'. When applying such a standard, even statements of alternatives and probabilities ('60% of men are ..., while 25 % are ...') can no longer be recognized as theory.[38] Indeed, the more realistic an explanation is, the more it may be rejected by analytical social sciences. As Dahrendorf wrote: 'The more "realistic" assumptions underlying scientific theories become, the more differentiated, limited, and ambiguous they become; but they also increasingly prevent the deduction of certain explanations or prognoses. In this sense, theories are better the more unrealistic they are, namely the more stylized, certain, and unambiguous their underlying assumptions are.'[39]

37 See for the following Seiffert (n. 35), 41 ff., 69 ff., 197 ff.

38 For example, Ralf Dahrendorf, *Pfade aus Utopia – Zur Theorie und Methode der Soziologie* (4th edn, 1986), 199 f.

39 Dahrendorf (n. 38), 200 ('In dem Maße, in dem die wissenschaftlichen Theorien zugrunde liegenden Annahmen "realistisch" werden, werden sie differenziert, eingeschränkt, mehrdeutig; im gleichen Maße aber verbieten sie die Deduktion bestimmter Erklärungen oder Prognosen. In diesem Sinne sind Theorien desto besser, je unrealistischer, nämlich stilisierender, bestimmter, eindeutiger ihre Annahmen sind.').

C. The Contextual Response

In sum, comparative lawyers can remain calm when faced with a critique that focuses on a lack of theorization and presents the analytical methods of social sciences as the ultimate panacea. In the first place, the very existence of the venerable hermeneutical method easily shows that analytical methods cannot neither claim to be the only scientific ones, nor impose their approach and way of thinking on other branches of scholarship. Second, analytical methods are by no means the only accepted ones even in sociology. On the contrary, other methods are at least equivalent. When, for example, the German Council of Science and Humanities in 2008 declared 9 out of 256 research organizations in sociology to be 'excellent', these best entities included, among others, quantitative as well as qualitative methodologies, hermeneutical methods as well as systems theory; even pragmatically oriented syncretists were in the lead.[40] In other words, the reproach of working without theory, without method, is also used within social sciences, addressed for example at sociologists who use hermeneutics or who are pragmatic syncretists. This reproach is part of a debate between different schools that exist within, for example, sociology – a conflict that is ultimately ideological in nature. Comparative law, like any other scholarly endeavor, can therefore take the accusation of a lack of 'theory' in stride. For it does not give rise to any objective and serious doubt about the legitimacy, or even the scientific value, of their approach. On the contrary, this reproach is only an attempt to import one of many viewpoints from social sciences, and to try and recruit more supporters for this position in comparative law. Even the multiplicity, and sometimes the contradictions of the approaches that exist in comparative law should not lead to a feeling of inferiority, because we are in good company here – *variatio delectat*.

For a practical-minded comparatist, the hermeneutical method is often the most useful. The description of historical questions, which we have discussed in contrast to analytical questions, will immediately appear familiar. After all, the search for the atmosphere, the style of a foreign legal order is of primary importance in comparative law, too. French, English

40 Steuerungsgruppe der Pilotstudie Forschungsrating im Auftrag des Wissenschaftsrates, 'Forschungsleistungen deutscher Universitäten und außeruniversitärer Einrichtungen der Soziologie, Ergebnisse der Politstudie Forschungsrating des Wissenschaftsrats,' https://www.wissenschaftsrat.de/download/archiv/pilot_ergeb_sozio.pdf?__blob=publicationFile&v=1 (last accessed 27 January 2023), 33f.

and German judgments, for example, are not only written in very different fashions, but the appropriate ways of reading and working with them differ vastly. In comparative law, a great number of aspects must be considered, a legal phenomenon must be viewed in its entire environment. For example, the law of evidence in the United States is difficult to comprehend without taking into account the importance and influence of the jury.[41] The development of common law through precedent is linked to the exact delineation between law and fact, which is not at all the same as in, say, German or French law.[42] Understanding the operation of law in sub-Saharan Africa requires an awareness of the importance and content of traditional African law.[43] In order to understand any foreign law, the comparatist must slowly familiarize himself with the material, must open himself step by step to its otherness. Through experience, one must develop a certain intuition – a typically hermeneutic approach.

Still, questions of a more analytical character do exist even in comparative law. This is especially the case when comparative law is used to find the best solution, for instance when a comparative interpretation of national law is called for, or in projects of legal harmonization. In such cases, the central interest of the comparatist is not to understand the foreign legal order on its own terms, but to use it as a quarry for ideas. But even in such situations, the basic question remains historical and thus more suited to hermeneutics. For in order to find the best solution, one must first understand the propositions of the different legal orders, their significance and their practical effects in their original environment. There remains, however, a clearly analytical part to these question, and one might well imagine that this part would be open to, and even call for, other methods, especially analytical ones. Yet in a surprising, almost ironic twist, it is the very opponents of the traditional method who do not follow this line of thinking. On the contrary, they admit, often expressly, that the functional

41 See Kischel (n. 1), § 3 marginal note 216; on the jury in general see *ibid.* § 3 marginal note 141 ff.; on the respective differences between the United States and England see *ibid.* § 3 marginal note 232.

42 On the distinction between law and fact in United States law, see Kischel (n. 1), § 5 marginal note 49 ff.; in German law, *ibid.* § 6 marginal note 105 ff.; for certain aspects in French law, *ibid.* § 6 marginal note 141 ff.

43 See e.g. Kischel (n.1), § 8 marginal note 24 ff; Gilles Cuniberti, *Grands systèmes de droit contemporains* (2nd edn, 2011), marginal note 441 ff.

method produces very good results especially when applied to finding best solutions.[44]

D. From Function to Context

Despite all these advantages, the functional method has its limitations. Moreover, the very term 'functional' seems to generate distorted ideas, as well as a defensive reflex among its opponents. It would therefore be better to drop the notion, and replace it with a new one: contextual comparative law. This contextual approach holds fast to the basic idea of functionalism, while avoiding its specific problems.

I. The Basic Idea of Functionalist Thinking

The core of functionalist thinking which should be retained is not the notion of function. On the contrary, it seems that it is precisely this notion that has led to many misunderstandings. The notion of functionalism is far from clear because, in various scientific disciplines, it designates quite distinct concepts.[45] In comparative law, however, these theoretically charged concepts play little role. On the contrary, when speaking of function in comparative law, the idea expressed is a very simple one, based on common sense and experience: The comparatist must free himself from his native thought structures and from the restrictions of his own legal system in order to avoid mistakes and make sensible comparisons.[46] Above all, it must be made clear that the mere wording of a statute, the incidental parallelism of legal concepts (e.g. *pouvoir discrétionnaire*/*Ermessen*/*discretion*) or the absence of a parallel concept (e.g. for the common law rule against perpetuities) must not be considered a sufficient basis for comparison. Once such purely external qualities are excluded, the object of comparison can only be the real-life situations behind the norm, what the norm regulates, as well as

44 See Reimann (n. 3), 691 ff.; Chodosh (n. 3), 1027 ff; Gerber (n. 6), 723.

45 See Michaels (n. 3), 344 ff. who distinguishes seven different concepts; see also e.g. Maurice Adams and John Griffiths, 'Against "comparative method" – Explaining similarities and differences' in: Maurice Adams and Jacco Bomhoff, *Practice and theory in comparative law* (2012), 279, 283 f.

46 See already Hein Kötz, 'Abschied von der Rechtskreislehre?', ZEuP 6 (1998), 493, 504 f.

its real effects, the real or imagined conflicts that the norm tries to solve. It is this approach, and no more, that functionalists refer to when they use the word 'functional'.[47] Critics, on the other hand, use a very different image of functionalism, one that is largely not shared by its adherents. According to this image, functionalism designates a method that needs a single clear function for each norm, that considers only sufficiently similar functions to be comparable, that is conceived essentially for private law, that assumes the same needs and the same solutions in all societies, that aspires to a harmonization of law, that hardly looks at the cultural context, that requires the comparatist to assume a totally neutral point of view, and that neglects the actual comparison[48] – in other words, a pure and simple caricature.

2. The Limits of Functionalism

Nevertheless, the critique also points out some real shortcomings of functionalism. First, functionalism is truly suited to only one of several types of comparative law questions – the classical problem comparison,[49] i.e. the comparison of problems that are laid out, as far as possible, by reference to factual situations (e.g. how is the buyer of a building protected against the possibility that the seller is not the owner?). By contrast, a strict understanding of functionalism would already find issue with a classical comparison that addresses not problems but concepts (e.g., how does federalism work in the United States, Spain and Germany?) Here, the basic question is no longer posed functionally, but uses notions immanent to the legal systems, with two legal concepts being compared in the abstract. The role and explanatory power of functionalism diminish even more when it comes to the various types of non-classical comparisons. When one addresses, for example, the methods of statutory interpretation in France and England, or the training of lawyers in France, the United States, and Japan, one is not talking about purely factual problems. When harmonization is pursued, there is a strong element of evaluation that is not directly addressed by functionalism. Question of a more systematic nature, for example about the development of legal families, are even totally beyond functional analysis.

47 Clearly, e.g. Michael Bogdan, *Komparativ rättskunskap* (2nd edn, 2003), 58 f.
48 For details see Kischel (n. 1), § 3 marginal note 6 ff. with additional references.
49 For a typology of legal comparisons see Kischel (n. 1), § 3 marginal note 165 ff.

These limitations do not, however, serve to refute the functional approach. They are so obvious that it would be rather strange to assume that functionalists are not aware of them. Indeed, Hein Kötz himself has emphasized without the slightest ambiguity that it is precisely the most interesting questions [sic!], concerning styles, procedures, mentalities and values, that the principle of functionalism is unable to grasp.[50] The consequences he draws from these limitations are typical of all traditional comparatists: far from rejecting functionalism, he simply warns 'against the dangers which attend an excessively absolute interpretation of the principle of functionality.'[51] Indeed, while the functionalist method is not directly applicable, its central requirement remains: one must always understand and take into account all aspects of the legal and extra-legal context of each legal phenomenon. For example, when it comes to establishing the methods of statutory interpretation in different countries, a truly wide range of aspects may be important, e.g. the historical development, the technical quality of legislation, the self-image of judges, or the different opinions on *who* should determine the meaning of the laws in the first place. If, to take another example, one wants to compare legal education, one has to consider historical developments, but also the extent to which the law is considered to be systematic in nature, or the typical profiles of legal professions in each country. In other words, the hard core of functionalism serves the comparatist as an excellent preparation for the solution of any type of comparative question. This core consists in always taking the context into account – it is *contextual* comparative law.

The dangers implicit in an excessively absolute interpretation of functionality do not end here. Thus, it is misleading to argue that a comparison must always have objects that serve the same function.[52] Abortion rules in different countries, for instance, may have the function of either limiting or supporting population growth, but this does not preclude a comparison.[53] Consequently, the additional question of whether (and when) two functions are similar enough to allow comparison[54] is meaningless. Moreover, it is not imperative in comparative law to explicitly identify and elaborate,

50 Kötz (n. 46), 505.
51 Kötz, (n. 46), 504 ('vor den Gefahren [zu] hüten, die ein allzu absolut gesetztes Funktionalitätsprinzip mit sich bringt').
52 As even Zweigert and Kötz do, see Zweigert and Kötz (n. 4), 33.
53 See Bogdan (n. 47), 59.
54 See Reimann (n. 3), 690; Husa (n. 18), 428.

at the beginning of any study, the social problem, the function of the norm, and to relate this function to the social problem in the other legal order.[55] The function is an important working tool, but it is not itself the subject of comparison. If, for a given problem, it is not difficult to find its relevant counterpart in the foreign legal order, all that must be done is not to lose sight of the factual problems involved.

3. Two Ways of Thinking

In sum, the traditional method and its critics have very different ways of thinking – which may well explain not only the never-ending controversy but also their mutual incomprehension. Traditional comparatists seek, without dogmatic preconceptions, a practical approach that allows them to avoid mistakes as much as possible. Their image of the comparatist is rather hermeneutic, the image of a researcher who gradually immerses himself into the different legal orders in order to understand their characteristic features and ways of thinking, and to develop an intuition as to their respective style. Many of their opponents, on the other hand, start – consciously or not – from an analytical approach, which prescribes a method to be followed in detail, and which ultimately serves to provide answers to broader, preferably critical and often abstract questions. This difference explains why traditionalists' methodological statements are treated in a literal and absolute manner, which is at odds with the traditional approach itself.[56] A flexible, practice-oriented approach that leaves each comparatist free to determine what interests him is seen by its critics as a common-sense, syncretistic approach. This is not necessarily incorrect. What is incorrect is to deny that it is even a method at all, that it constitutes a valid scientific or scholarly approach.

4. The Contextual Approach in Brief

The basic concept of the contextual approach is the set of ideas presented here. It responds to the critique of functionalism and defends the core

55 As seems to be the underlying assumption in Zweigert and Kötz (n. 4), 33.

56 See also the critique by Sarah Piek, 'Die Kritik an der funktionalen Rechtsvergleichung', ZEuP 21 (2013), 60, 85.

of functionalist thinking while pointing out its problems and shortcomings. Methodologically, it is firmly rooted in the hermeneutic tradition; it does not seek, for instance, grand political or economic guiding ideas (without rejecting them in principle); and it is open to the multiplicity of research questions[57] in comparative law without excluding certain questions, answers, or techniques. However, what the contextual approach does not accept is any attempt to simplify or reduce the complexity of reality, especially in the form of models; on the contrary, it demands that all factors and all insights, legal or extra-legal, be taken into account. Its method is that of a slow familiarization with the foreign law and the legal field in question, of looking for interrelations, with a special eye to the atmosphere, the style of the foreign legal order, which can be grasped only with intuition honed by experience. The contextual approach does not provide an easy formula, in the sense of a recipe that one should follow step by step for any kind of question – simply because there is no such 'method'. Experienced comparatists may well give advice on how to proceed in practice.[58] They can also try to describe and classify typical errors in comparative law in order to better avoid them.[59] But beyond that, each comparative question requires an independent analysis and an attempt to incorporate all relevant aspects of the context.

E. The Practical Perspective

A famous German methodologist has observed that legal practitioners respectfully leave essays on legal theory at their place in the library, that judges pay little heed to academic accounts of methodology.[60] And, in fact, we must be careful not to exaggerate the methodological debate in comparative law and its numerous details. Of course the discourse on method is important; but what is at least as important is to elaborate the more practical aspects of comparative law, which are necessary to facilitate the understanding of the different contexts of the world – the context of civil law, of common law, of African law, or the different contexts in Asia, to mention a few. This is one of the most important goals of comparative law:

57 For a typology see Kischel (n. 1), § 3 marginal note 165 ff.
58 For such practical advice see Kischel (n. 1), § 3 marginal note 235 ff.
59 For such a classification see Kischel (n. 1), § 3 marginal note 202 ff.
60 See Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (2nd edn, 1972), 7 ff.

helping comparatists by providing them with the information necessary to avoid getting lost in foreign law, to prevent mistakes, to understand the context in which they want to work, to slowly become familiar – in a hermeneutical way – with the different contexts that exist in the world.

This short article is obviously not the place to meet these expectations – which we have tried elsewhere.[61] Nevertheless, we should mention very briefly a few examples to at least throw a cursory highlight on the practical side, which is crucial in the contextual approach.

I. Civil Law and Common Law

Civil law and common law, for example, have been so much the focus of comparative studies that one could easily assume that there is hardly anything left so say on the topic. Such a supposition would, however, be erroneous since, quite on the contrary, there are many aspects that deserve a new look. We have already mentioned two points, the jury and the distinction between law and fact. The jury is a factor that certainly explains and highlights many of the peculiarities in common law, but also gives rise to many misunderstandings (it is neither systematically composed of twelve people, nor is it a very common procedure in private law, nor does it decide only questions of fact while the judge is charged with the questions of law).[62] The distinction between law and fact causes many problems in comparative law because comparatists tend to believe that the dividing line between the two is the same everywhere, which is not at all the case if one compares, for instance, English and German law.[63] When an English judge holds that the standard of reasonableness in negligence requires a rider by night to proceed at a speed that always allows him to stop within his range of vision, this is clearly a question of law for a German

61 See Kischel (n.1), §§ 5-11; see also for just one example Uwe Kischel, 'Après la transition – La situation juridique actuelle de l'Europe de l'Est', Revue Internationale de Droit Comparé (2015), 145-166, describing and analyzing the context of Eastern Europe at that moment.

62 See Uwe Kischel, 'Der menschliche Faktor – Der Mythos der Jury im common law' in: Dirk Hanschel, Sebastian Graf Kielmansegg, Uwe Kischel, Christian Koenig and Ralph Alexander Lorz (eds), *Mensch und Recht – Festschrift für Eibe Riedel zum 70. Geburtstag* (2013), 631 ff; Kischel (n. 1), § 5 marginal note 141 ff.

63 On the difference between law and fact in the law of the United States, see Kischel (n. 1), § 5 marginal note 49 ff.; in German law, *ibid.* § 6 marginal note 105 ff. and for certain aspects in French law, *ibid.* § 6 marginal note 141 ff.

lawyer, but a question of fact in English law.[64] The implications not only for the role of the jury, but also for the scope of appeal are obvious. In the final analysis, the question of law and fact even shows that, contrary to widespread assumptions, the common law does not acquire more and more detail through an ever-increasing number of precedents.[65] There are, of course, many other points to be examined more closely. For example, it is impossible to really understand German law without understanding the German technique of 'subsumption', which represents not only a way of writing, but a typical and fundamental way of thinking for German lawyers.[66] Conversely, the venerable institution of the code in France and Germany has become a kind of myth for common law lawyers, the meaning and importance of which are often misunderstood and exaggerated.[67]

Attention must also be paid to necessary differentiations *within* these two traditional contexts. The differences between the law in England and in the United States, which can often be traced back to the influence of legal realism or lack thereof, preclude many generalizations about the common law context as such, and are even important for understanding the position of further common law countries.[68] As regards the context of civil law, one should not forget the diversity between countries and regions, either. Spain, for example, is much less under French influence than is sometimes believed.[69] Eastern Europe has gained in legal importance, but one can no longer simply classify it under the heading of 'transformation states'.[70] Or we could mention Latin America, which is marked, to a greater or lesser degree depending on each country, by a sometimes wide difference between law in books and law in action, by corruption, by the existence of an independent law in the *barrios* or *favelas*, and by a legal pluralism that must recognize the existence of a traditional indigenous law.[71]

64 For English law see *Tidy v. Battman* (1934) 1 KB 319 (CA) 319, 322 f.; *Morris v. Luton Corporation* (1946) 1 KB 114 (CA) 116.
65 See *Qualcast (Wolverhampton) Ltd v. Haynes* (1959) AC 743 (HL) 758 (per Lord Somervell), 761 (per Lord Denning); Kischel (n.1), § 5 marginal note 51.
66 See Kischel (n. 1), § 6 marginal note 109 ff.
67 See Kischel (n. 1), § 5 marginal note 36 ff, 58 ff.
68 See Kischel (n. 1), § 5 marginal note 225 ff, 254 ff, 259 ff.
69 See Kischel (n. 1), § 7 marginal note 16 ff.
70 See Kischel (n. 1), 145, 145 ff.
71 See Kischel (n. 1), § 7 marginal note 180 ff.

2. And the Rest of the World ...

It is, however, non-Western law that even more often poses problems for comparatists and to which, therefore, more attention should be paid. In sub-Saharan Africa, the difference between common law and civil law countries does, of course, exist but it often does not play a decisive role. Moreover, in many of these countries, this law does not seem to work very well. Nevertheless, there is law that plays an important and effective role in people's everyday lives – yet it is not state but rather traditional law. It fills the gaps resulting from ineffective state law, and therefore needs to be analyzed and understood, first on its own terms, but also in its relationship to state law.[72] Other contexts certainly deserve a great deal of attention as well:[73] China, for example, where it is easy to exaggerate the importance of Confucianism, but hardly the importance of Communist Party rule; India, where, surprisingly, law plays a truly important role in the development of the country (but traditional Hindu law does not); Japan, Taiwan and South Korea, which form the core of a context specific to Southeast Asia. Islam is not only the basis of the only religious law that plays an internationally important role today; it is also significant in two distinct ways, in that one must always differentiate between (classical) Islamic law as such, and the law in Islamic countries. Understanding Islamic law, for example its fundamental problem with legal change (*ijtihad*),[74] is becoming increasingly important far beyond the boundaries of academic comparative law, in light of its unmistakable and current political implications. Finally, there are many other contexts that should not be forgotten or ignored in comparative law: Jewish law, canon law, European law, public international law, and even the famous *lex mercatoria*, whose very existence is questionable.

72 See Kischel (n. 1), § 8 marginal note 1 ff.

73 For the following see Kischel (n. 1), § 9 marginal note 66 ff., 100 ff. (China); § 9 marginal note 205 ff., 228 ff., 244 (India); § 9 marginal note 135 ff. (South-East Asia); § 10 marginal note 1 ff. (Islam).

74 See e.g. Wael B. Hallaq, 'Was the gate of ijtihad closed?', International Journal of Middle East Studies 16 (1984), 3 ff.; for a classic Western description see Joseph Schacht, *An introduction to Islamic law* (1964), 69 ff.; in more detail Kischel (n. 1), § 10 marginal note 44 ff.

F. Conclusion

The contextual method provides a practical and pragmatic approach to comparative law. It builds on traditional functionalism, retaining its core while avoiding its problems and limitations. Its methodological basis is hermeneutics, which describes very clearly the typical approach of most experienced comparatists: the slow familiarization with the foreign law and with the environment in which it is inserted, the search for its atmosphere, its style, its legal and extra-legal peculiarities, in order to develop an intuition that allows the comparatist to evade the pitfalls of the topic, and to better understand the functioning of the respective foreign law in its context.